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IN THE

Supreme Court of the United States

October Term, A. D., 1956

No. 437

CARL DRATH, t/a BROADWAY GIFT COMPANY
Petitioner,

v.

FEDERAL TRADE COMMISSION
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Reasons Relied on for Allowance of Writ.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Carl Drath, an individual, t/a Broadway Gift Company, respectfully petitions this Honorable Court for a writ of certiorari to review an order of the United States Court of Appeals for the District of Columbia Circuit, enjoining petitioner from conducting his business pending a review in that Court sought by petitioner from a cease and desist order issued by respondent.

I. ORDER BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit (R. 158), review of which is hereby sought, is set forth in the Appendix, page 21. No opinion was filed.

II. JURISDICTIONAL STATEMENT

Said order of the United States Court of Appeals for the District of Columbia Circuit is dated and was entered on August 1, 1956, and the Court's order denying petitioner's motion for rehearing is dated and was entered on August 24, 1956.

Jurisdiction of this Honorable Court is invoked under the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U.S.C. 1254). Cf. Rule 20 Revised Rules of the Supreme Court of the United States.

III. QUESTION PRESENTED

Does Section 5(c) of the Federal Trade Commission Act of September 26, 1914, as amended, March 21, 1938, c. 49, Sec. 3, 52 Stat. 111 (15 U. S. C. 45(c)), authorize a court of appeals of the United States to issue an order enjoining and restraining a party seeking review of a Commission cease and desist order, under procedures provided by said Act, from conducting the business against which said order to cease and desist was issued, pending the outcome of his petition for review?

IV. STATUTE INVOLVED

The pertinent portions of the Federal Trade Commission Act of September 26, 1914, as amended, March 21, 1938, c. 49, Sec. 3, 52 Stat. 111 (15 U. S. C. 45), here involved, provide:

> "Sec. 5
>
> "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> The Commission is empowered and directed to prevent persons . . . from using unfair methods of com-

petition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce . . . it shall issue and serve upon such person . . . a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act . . . it shall issue and cause to be served on such person . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice . . .

"(c) Any person . . . required by an order of the Commission to cease and desist . . . may obtain a review of such order in the court of appeals of the United States . . . by filing in the court, within sixty days from the date of service of such order, a written petition praying that the order of the Commission be set aside . . . Upon such filing of the petition . . . the court shall have jurisdiction . . . and shall have power to make and enter . . . a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite . . . To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

"(d) The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

"(e) . . .

"(f) . . .

"(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time . . . or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed."

V. STATEMENT OF THE CASE

Under date of April 23, 1956, petitioner timely filed in the United States Court of Appeals for the District of Columbia Circuit, his petition to review and set aside or modify a cease and desist order issued by the Federal Trade Commission (hereinafter referred to as the Commission). On May 21, 1956, the Commission, in compliance with Rule 38(g), Rules of the United States Court of Appeals, requiring that the transcript of record before the Commission be filed with the Court of Appeals within forty days from the date of service of the petition for review, filed with the Court the certified transcript of record.

On July 5, 1956, the Commission filed a motion for an injunction pendente lite (R. 1), to which petitioner on

July 20, 1956, filed a motion to strike the attachments thereto and his opposition to the motion (R. 138). Oral argument before Judges Miller, Fahy and Burger was had on July 26, 1956, and on August 2, 1956, petitioner's counsel received by United States mail a copy of the Court's order dated August 1, 1956 (R. 158; App. 21), granting the Commission's motion.

Under date of August 8, 1956, petitioner filed a motion for rehearing before the Court in banc (R. 162), together with a motion (R. 159) addressed to the Division of three judges who had issued the enjoining order, for a stay of said order pending determination by the whole Court of the motion for rehearing in banc, and requesting clarification of the language of paragraph numbered 2 of the enjoining order, reading as follows:

> "2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme."

Under date of August 13, 1956, an order (R. 161) was entered denying petitioner's motion for stay and clarification; and under date of August 24, 1956, an order (R. 170) was entered denying petitioner's motion for reconsideration in banc.

Petitioner made application on August 23, 1956, to the Honorable Hugo L. Black, Associate Justice of this Honorable Court, for an appropriate order to the United States Court of Appeals for the District of Columbia Circuit, staying that Court's enjoining order of August 1, 1956. This application was denied by Mr. Justice Black on August 30, 1956.

As the case on petitioner's petition for review of the Commission's cease and desist order now stands before the Court below, petitioner has filed his brief in support of his petition for review, the Commission has filed its brief in answer, and petitioner has until September 26,

1956, in which to file a reply brief. The case has not as yet been calendared for hearing by the Court.

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction over petitioner's petition for review, by virtue of Section 5(c) of the Federal Trade Commission Act of September 26, 1914, as amended, March 21, 1938, c. 49, Sec. 3, 52 Stat. 111 (15 U.S.C. 45(c)).

VI. REASONS RELIED ON FOR ALLOWANCE OF WRIT

This case involves a new and important question of Federal law which has not yet been passed upon by this Court. The question is whether a citizen, having availed himself of his statutory right to have a cease and desist order issued against him by the Commission, reviewed by a court of appeals—with the statute also providing that such an order shall become final only upon the exhaustion of such remedies and upon affirmance of the Commission's cease and desist order—can be made the subject of an injunctive order pendente lite issued by the reviewing court of appeals on the interlocutory motion of the Commission whose administrative action is the subject of the review, thereby effectively putting into operation the prohibitions contained in a not-as-yet-final and affirmed cease and desist order of the Commission.

The question is of such imperative public importance as to justify deviation from normal appellate processes and require immediate settlement in this Court, since if the action of the court of appeals below is permitted to stand as a precedent, every business engaged in interstate commerce against whom the Commission issues a cease and desist order under the Federal Trade Commission Act, would be faced, upon seeking review of such order, with having the prohibitions of such administra-

tive order put in effect before it becomes final, if ever, and before the processes of law granted by statute which are intended to operate as a stay, are completed.

Furthermore, this procedure marks such a complete and drastic departure from the accepted and usual course of judicial procedure in matters of this nature, as to call for an exercise of this Court's power of supervision.

1. There is no authority or precedent for the action of the Court of Appeals in granting an injunction pendente lite, and such action constitutes an erroneous interpretation of the Federal Trade Commission Act.

This is the first case in the history of the Federal Trade Commission Act in which a court has granted an injunction such as here involved. There is no statutory authority or legal precedent for such action.

Although the language[1] of the provision of the Federal Trade Commission Act under which the Commission moved the Court of Appeals for an injunction pendente lite, has been in the Federal Trade Commission Act since March 21, 1938, this is the first time the Commission has successfully invoked such language. Therefore, both the Commission's action in seeking, and the Court of Appeal's action in granting the motion for injunction pendente lite, marks a drastic and fundamental departure from previous long established precedent and procedure, both of the Commission and the courts.

That the particular language of the Act here involved is not clear as to its applicability, is indicated by the long delay between its enactment on March 21, 1938, and the Commission's first successful attempt to invoke it—

[1] Sec. 45(c), Title 15, U.S.C.: ". . . and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite . . ."

some eighteen years. If the Commission had felt that the langauge was intended to serve the purpose accomplished in the Court below, then surely the Commission would have long since availed itself thereof—particularly would they have done so immediately following the inclusion of the language in the Act in 1938, otherwise there would have been no reason for its inclusion. Then, if ever, the real purpose of the language must have been known, or was susceptible of determination.

The well established rule of law is that interpretations by an administrative agency of laws under which it functions, are entitled to great weight by the judiciary. See *L. Gillarde Co.* v. *Joseph Martinelli & Co.*, 169 F.2d 60 (CCA-1, 1948).

Since the Commission itself sought and actively supported the 1938 Wheeler-Lea Amendments to the Federal Trade Commission Act of 1914, by which the language here under consideration was added to the Act, surely their implied interpretation of such amendments through non-use is patently indicative of their meaning. Here, the Commission's implied interpretation over some eighteen years of the very Act under which it operates and draws its vitality, is controlling here. The complete lack of a successful attempt to invoke the language of the Act prior to this case, constitutes the Commission's implied interpretation that the language does not, and was not intended to, apply to the situation to which it is attempted to be applied here.

The Court's attention is invited to Vol. 83, Congressional Record, March 11, 1938, pages 3254-3256, wherein during a discussion on the floor of the Senate at the time the Wheeler-Lea Amendments were passed by the Senate, after having been passed by the House, Senator Wheeler, co-sponsor of the bill, gave an analysis of the provisions of the bill. In commenting on the amendments to Section 5 of the Act, which included the language quoted

in footnote 1, supra, page 7, it should be noted that Senator Wheeler made no mention whatsoever of this language, its purpose or its intent. Unmistakably, if it had been intended that so drastic an interpretation of an amendment as advocated by the Commission here, and as adopted by the Court below, had been intended, the prime sponsor of the bill in his review analysis of the amendment, would have at least commented thereon, as he did with respect to the temporary injunction provisions of Section 13 thereof.

The same Congress which passed the Wheeler-Lea Amendments, had no trouble when it added Section 13 to the Act (15 U.S.C. 53) in specifically spelling out the right of the Commission to apply to a district court for, and the right of the district court to issue, a temporary injunction, where the dissemination of false advertising of foods, drugs, cosmetics and devices is concerned. The pertinent portions of this section read:

> "(a) Whenever the Commission has reason to believe—
>
> "(1) that any person . . . is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12 of this title, and
>
> "(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5 of this title, would be to the interest of the public,
>
> *the Commission . . . may bring suit in a district court . . . to enjoin the dissemination* or the causing of the dissemination of such advertisement. *Upon proper showing a temporary injunction or restraining order shall be granted without bond . . .*" (Emphasis supplied). Act of Sept. 26, 1914, as added Mar. 21, 1938 § 4, 52 Stat. 114 (15 U.S.C. 53).

It would seem, by analogy, that where Congress means and intends to give some extraordinary power or authority to the Executive or to the Judiciary, it says so explicitly. Cf. *Fleming* v. *Mohawk Wrecking and Lumber Co.*, 331 US 111, 121.

It is therefore respectfully urged that the history of the Act, as well as the position in the Act of the questioned language (immediately following the 1938 addition "and enforcing the same to the extent that such order is affirmed"), plus the provisions of the 1938 subsection (g)[2] providing that the Commission's order shall become "final" only after the procedural steps set forth therein had expired or had been followed and the order affirmed, as well as the addition in 1938 of Section (1)[3] providing for a civil action by the Commission for a money penalty for violation of a *final* order of the Commission, establishes that the language was not intended to apply to a case at this stage of the proceedings, but was intended to give the court of appeals the right to issue necessary ancillary writs, such as a writ of contempt, at the later stage where the Commission, believing a violation of its order, as affirmed by a circuit court of appeals, was occurring after it had become *final* through the exhaustion of the judicial review procedure, could go into the court of appeals with a contempt proceeding. Since it would still be necessary for the Commission at that stage to establish that there was a violation in fact, the court pending such proceedings, could then issue such "writs as are ancillary to its jurisdiction

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[2] See pp. 2-4, supra, Statutes Involved.

[3] Sec. (1) provides: "Any person . . . who violates an order of the Commission to cease and desist *after it has become final*, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States . . ." (Emphasis supplied).

. . ."—i.e., those writs which are necessary to enforce, or punish for disobedience of, its final mandate affirming the cease and desist order, and ordering enforcement thereof.

Parenthetically, it should be noted that Congress in enacting the 1938 Amendments to the Federal Trade Commission Act of 1914, removed paragraph four of Section 5 (15 U.S.C. 45) of the original Act, under which the Commission had been given the authority to institute an original proceeding in a court of appeals for enforcement of its cease and desist order and the court was given "power to make and enter . . . a decree affirming, modifying or setting aside the order of the Commission." This deleted provision is similar in all major aspects with the same enforcement provisions of the Clayton Act of October 15, 1914, c. 323, Sec. 11, 38 Stat. 734 (15 U.S.C. 21) (which Act was part of the same general legislation setting up the Federal Trade Commission and which provision still remains in the original Clayton Act and now extends to the Robinson-Patman Act Amendment thereof (49 Stat. 1526; 15 U.S.C. 13)).

As this Honorable Court pointed out in *Federal Trade Commission* v. *Ruberoid Co.*, 343 US 470, at page 478:

> "Congress in 1938 amended similar language in the Federal Trade Commission Act, so that the reviewing court is now plainly required, *upon affirmance* to enforce an order based upon violation of that Act." (Emphasis supplied.)

The Court then footnoted the following:

> " 'To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.' 52 Stat. 113, 15 USC § 45(c). Unless the party subject to an order issued under the provisions of the Federal Trade Commission Act files a petition for review within sixty days, the order becomes final and its violation punishable. 52 Stat. 113, 114, 15 USC § 45(g) and (1)."

The Court was, of course, referring not to an original proceeding initiated by the Commission, since that authority had been removed from the Federal Trade Commission Act by the 1938 Amendments, but to the retained provision applying to an original proceeding for review initiated by the party affected by the Commission's order, to which provision had been added in 1938, the language quoted by the Court above, followed by the ancillary writs language in question here.

It would seem to follow that since the Commission under the Federal Trade Commission Act as amended in 1938, no longer has any authority to initiate an original proceeding in a circuit court of appeals, it must wait until its order becomes *final,* after an affirmance of its order on the aggrieved party's petition for review, before ancillary jurisdiction attaches upon a showing of disobedience of the court of appeals' order "commanding obedience to the terms of such order of the Commission."

2. The order is an unconstitutional deprivation of petitioner's right to due process of law.

There is now pending determination before the Court below, a petition for review of the Commission's cease and desist order, filed by petitioner under the statutory right and privilege created and provided for by the Federal Trade Commission Act. The effect of the enjoining order of the Court of Appeals, is to enforce that cease and desist order prior to a hearing and determination on the merits of petitioner's statutory right to review. To hold that the ancillary writs power as exercised by the court below, includes the power to issue a temporary injunction upon the filing of a petition for statutory review by a party aggrieved by the Commission's cease and desist order, and before the validity of that order has been determined, and before it can be enforced as final (if affirmed),—effectively deprives the

party aggrieved of his right to that very due process of law which the Fifth Amendment and the Federal Trade Commission Act itself give him. Such a holding cancels out those rights to judicial review, by eradicating the non-final character of the Commission's order as defined by the statute, and makes a shambles of the purpose of the judicial review provisions of the statute, in that the Court must of necessity have felt that the order of the Commission was a valid, enforceable and final one (even though determination in this respect had not as yet been made on the merits) when it issued its temporary enjoining order.

Thus constitutional infirmities appear not only in the action of the Court below but in the ancillary writs language of the Statute, for the obscure language thus becomes a trap for the unwary who—seeking his day in court through judicial review of an administrative agency's order believes the purpose of the review language is to accord him due process of law, and reads the language of the review proceedings literally as meaning that the finality and effectiveness and enforceability of that administrative, non-judicial order is stayed until all the processes of law made available to him have been availed of—files his petition for review, only to find himself almost immediately restrained from engaging in a business, the lawfulness or unlawfulness of which has not as yet been judicially determined as to him. Laws are not made to trap, but to prohibit and regulate. When they are so vague, indefinite and inconsistent in their context that men of common intelligence are required to guess at the meaning of the enactment (Cf. *Winters* v. *New York*, 333 US 507, 515), then constitutional infirmities appear. The sense of fair play is the essence of due process. *Galvan* v. *Press*, 347 US 522, 530.

Also if, as petitioner contends here, an erroneous statutory construction lies hidden away in vaguary, then stat-

utory rights "will be whittled away," Cf. *United States* v. *Carolina F. Carriers Corp.*, 315 US 475, 489. See also *United States* v. *Five Gambling Devices*, 346 US 441; *United States* v. *Cohen Grocery Co.*, 255 US 81; *Screws* v. *United States*, 325 US 91.

Since the courts may not by injunctive decree create new duties the prescription of which is the function of Congress, or place a defendant for the future in a different class than other people, and since a decree must not be so vague as to put the whole conduct of a defendant's business at the peril of a summons for contempt, or cause the defendant thereafter not "to be under the protection of the law of the land," as stated in *Hartford-Empire Co.* v. *United States*, 323 US 386, 409, 410,—the rule stated in *New York N.H. & H.R. Co.* v. *Interstate Commerce Commission*, 200 US 361, 404, would seem to apply here; namely, that to accede to the doctrine relied upon below, would compel the courts under the guise of protecting commerce to announce a rule which would be destructive of the fundamental liberties of the citizen.

3. The enjoining order of the Court below was improvidently granted, there being no adequate showing of the necessity therefor.

The general rule of law governing the granting of an application for an interlocutory injunction is that the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond. *Ohio Oil Co.* v. *Conway*, 279 US 813.

In support of its allegation that "immediate and irreparable injury will result to the public," the Com-

mission relies entirely on the fact of the mailing of a large quantity of third-class mail by Hub Sales Co. of Chicago, Illinois (the contents of which, or the addressees thereof, have not been identified), and the fact that the Commission has received more than twenty-five letters of "complaint," fourteen of which are attached to its motion, and nine of which are from parents of small children who also supplied affidavits. It is difficult to rationalize how such "complaints" disclose "immediate and irreparable injury to the public." None allege fraud or an unfair practice. Most merely express personal dislike for having mail matter of this type delivered to their address. The principal tone of all the "complaints" is one of personal objection to having their names on mailing lists used by such mail order enterprises. That a few such mailing pieces might have been addressed to small children, is no indication that irreparable injury has or will result to the public. Even those isolated instances show no such injury, as the parents indicate the use of their supervisory parental authority to prevent exposure of their children to something the parents consider undesirable.

Injunctive relief may not be granted in the absence of proof of any threatened or probable act which might cause irreparable injury. *Public Service Commission of Utah* v. *Wycoff Co.*, 344 US 237.

The Commission failed to show, and cannot show, that its position, or the alleged injury to the public, is any different now than at the time it initiated its administrative proceedings against petitioner. At that time, and at all times subsequent thereto, there did not exist grounds or authority upon which a court could have issued an injunction against petitioner. The facts of the case are basically the same now as they were at that time, and the basic factors upon which the Commission

relied in seeking and obtaining the pendente lite enjoining order here in question, are no different than the basic factors upon which the Commission decided to issue its cease and desist order in the first place—namely, the mailing in interstate commerce of push cards or pull tab catalogues with an offer to sell certain specific items of merchandise at a specific price. The position of the Commission under the law could be no different merely because of the size of the mailings or the nature of the addressees.

Thus the status quo of the parties having remained the same, there is no basis now to change such status quo, particularly in view of the undeniable great and irreparable harm, injury and damage being suffered by petitioner by reason of the granting of the enjoining order, and which harm, injury and damage he will continue to suffer if the relief herein requested is not granted, and for which he has no remedy at all. If it should ultimately be decided that the Commission's order is improper and same should be set aside or modified, petitioner would be in the position of having suffered loss, injury and damage with no redress or compensation available to him. It is thus evident that the action of the Court of Appeals has the effect of impairing the effectiveness of the provisions in the Federal Trade Commission Act, giving a party the right to judicial review of a Commission order, and makes an ambiguity of subsection (g)[4], which specifically sets forth when a Commission order may become "final." The following is the effect and consequence of the exercise of this power by a court of appeals: Since the Commission's administrative order is required to be based upon a finding that the proceeding is in the public interest, and since the ancillary writs provision invoked in this case by the

[4] See pp. 2-4, supra, "Statutes Involved."

Court below provides for the issuance of such writs as are necessary in the judgment of the court to prevent injury to the public or to competitors pendente lite, the same factors upon which the cease and desist order is based, in effect, may merely be brought to the notice of the reviewing court by a motion filed by the Commission as a grounds for the issuance of a writ of injunction pendente lite. In other words, to all intents and purposes, the Commission can effectively cut off or impinge upon a citizen's right to a review, by having its cease and desist order made effective during such procedure, contrary to the clear provisions of the statute as to finality after judicial review and *affirmance*.

The undeniable equitable rule governing the issuance of injunctions, requires a weighing of the balance of injury to the respective parties by the denying or granting of the injunction. *Ohio Oil Co.* v. *Conway, supra.* Surely the irreparable harm, injury and damage cast upon petitioner far outweighs any possible, alleged injury to the public, particularly in the remote and minor circumstances pleaded by the Commission as justification for its injunctive request. The extraordinary character of the injunctive remedy and the danger that its use in improper cases may result in serious loss or inconvenience to an innocent party require that the power to issue it should not be lightly indulged in, but should be exercised sparingly and cautiously, only after thoughtful deliberation, and with a full conviction on the part of the court of its urgent necessity. In other words, the relief should be awarded only in clear cases, reasonably free from doubt, and, when necessary, to prevent great and irreparable injury. 28 *Am. Jur., Injunctions*, Sec. 24.

As to the necessary element of probability that the Commission expects to ultimately prevail on the merits, the Commission relied on numerous decisions in the United States courts of appeals upholding and affirming

cease and desist orders issued by it. However, if a comparison between those cases and the instant case is justified, it can be urged that petitioner's method of doing business is identical in every material respect with the same merchandising plan involved in *United States* v. *Halseth*, 342 US 277, wherein the Supreme Court at page 281, stated:

> "Congress has had before it many times the question of what gambling devices and paraphernalia it would exclude from the mails and *interstate commerce* . . . If punchboards are to be added to the category of devices to be excluded, it is for Congress to make the addition." (Emphasis supplied).

There has been no action by Congress in this regard since the *Halseth* decision.

4. The enjoining order of the Court of Appeals is improper as to form, is vague, indefinite and uncertain, and clarification has not been granted.

Rule 65(d), Federal Rules Civil Procedure [5] providing for the form and scope of an injunction or restraining order, would seem by analogy to set the standard insofar as the issuance of such an injunction or restraining order by a court of appeals is concerned, if a party affected is to be fairly apprised of the grounds on which the injunction or restraining order is issued, as well as his rights and liabilities thereunder. Cf. *Schwegmann Bros. G. S. Mkts.* v. *Hoffman-LaRoche, Inc.*, 221 F.2d 326 (CCA-5, 1955): An injunction must describe specifically and in reasonable detail, not by reference to the complaint or some other document, act or acts sought to be restrained.

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[5] Rule 65(d), Fed. Rules Civ. Proc., provides: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . ."

Since Rule 14, Title II, Rules of the United States Court of Appeals for the District of Columbia Circuit, provides that "injunction pending appeal from the district court in civil cases shall be governed by the applicable provisions of the Federal Rules of Civil Procedure," it would appear that Rule 65(d) of the Federal Rules would be applicable, along with the other Federal Rules indicated in Rule 14. Rule 14 of the Court of Appeals is made applicable to administrative agencies, by the provisions of Rule 38(h), Rules of the Court of Appeals, which provides that "The applicable provisions of Title II of these rules shall govern such cases."

The provisions of Rule 65(d) (which is substantially former Section 383, Title 28 U. S. C.), should be scrupulously observed. *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 US 588, 591. The rule is mandatory, and failure to follow the mandatory language requires dissolution of an injunction pending appeal. *Mayflower Industries* v. *Thor Corp.*, 182 F.2d 800, 801 (CCA-3, 1950).

In the instant case, the Court of Appeal's enjoining order recites no specific reason for its issuance, other than the Court's consideration of the Commission's motion for an injunction pendente lite, and no opinion was filed by the Court. It leaves petitioner in the position of not knowing the specific reasons for the issuance of the order. Furthermore, from the vague and uncertain language of the Commission's order, as adopted verbatim by the Court below, petitioner has no way of knowing what is expected of him with respect to carrying on his general business of merchandizing by mail, even though he fully complies with the injunction against mailing out any material, which in the hands of others could be used in conducting a game of chance; for petitioner has on hand many orders from customers accompanied by remittances, for the numerous items of merchandise which he has in stock and in which he has a large and substantial investment, and it cannot be determined from the wording of the enjoining

order whether he can or cannot fill such orders, dispose of such merchandise, or dispose of his business as such. As set forth in the Statement of the Case, pp. 4-6, supra, petitioner's motion to the Court below for a clarification of its order, was denied.

VII. CONCLUSION

This Honorable Court has often exercised the power by prerogative writ to review interlocutory orders of lower courts before final judgment, and has stated that it will do so when the ruling involves a jurisdictional question of large public importance or where the remedy of appeal would be clearly inadequate. *United States Alkali Export Ass'n* v. *United States,* 325 US 196; *De Beers Consol. Mines* v. *United States,* 325 US 212. Here, there is not even a remedy of appeal, inadequate or otherwise, as a matter of right, except by the intervention of this Honorable Court.

Wherefore, petitioner respectfully prays that this Honorable Court grant this petition; issue its writ of certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit; hear, consider and determine the question presented; set aside said order of the Court below; and grant such other and further relief as to the Court may seem just and equitable.

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1956

No. 13,303

Carl Drath, t/a Broadway Gift Company,
Petitioner,

v.

Federal Trade Commission,
Respondent.

Before: Wilbur K. Miller, Fahy and Burger, Circuit Judges, in Chambers.

Filed Aug 1 1956 Joseph W. Stewart Clerk

ORDER

This case came on for consideration on respondent's motion for an injunction pendente lite and on petitioner's motion to strike the exhibits to respondent's motion for an injunction, and said motions were argued by counsel.

Upon consideration whereof, it is ORDERED by the Court that the aforesaid respondent's motion be granted and that, pending hearing and disposition of this petition for review by this Court, or until further order of this Court, Carl Drath, individually and trading as Broadway Gift Company, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other devise, in connection with the offering for sale, sale or distribution of any merchandise in commerce, as "commerce" is defined in the Federal

Trade Commission Act, be, and they are hereby, enjoined from and directed to cease and desist from:

1. Supplying to or placing in the hands of others pull cards, push cards or any other devices which are designed or intended to be used in the sale or distribution or respondent's merchandise to the public by means of a game of chance, gift enterprise or lottery scheme;
2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme.

It is FURTHER ORDERED by the Court that the aforesaid motion to strike the exhibits to respondent's motion for an injunction be, and it is hereby, denied.

Per Curiam.

Dated August 1 1956

A true copy,

Test: JOSEPH W. STEWART, Clerk,
United States Court of Appeals
for the District of Columbia Circuit,
/s/ By: William D. Secrest, Deputy Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 437

CARL DRATH, T/A BROADWAY GIFT COMPANY,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

No opinion was written by the Court of Appeals for the District of Columbia Circuit.

JURISDICTION

The judgment of the court of appeals (Pet. 21–22) was entered on August 1, 1956. The petition for a writ of certiorari was filed on September 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Section 5 (c) of the Federal Trade Commission Act authorizes a court of appeals "to issue such writs

as * * * are necessary in its judgment to prevent injury to the public * * * pendente lite." The following questions are presented:

1. Whether this provision authorizes a court of appeals to enjoin, during the pendency of proceedings before it to review a cease-and-desist order of the Federal Trade Commission, the practices which the Commission prohibited.

2. If so, whether the court of appeals abused its discretion in concluding that the public interest required such an injunction *pendente lite*.

STATUTE INVOLVED

Sections 5 (a) and 5 (c) of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. 45, provide in part as follows:

> SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *
>
> SEC. 5. (c) * * * Upon such filing of the petition [to review] and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the

same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. * * *

STATEMENT

In February 1954 the Federal Trade Commission issued a complaint charging petitioner with unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (52 Stat. 111, 15 U. S. C. 45), namely, using lottery schemes or games of chance in the interstate sale and distribution of merchandise. After a hearing, the Commission held that petitioner had violated the Act as charged, and issued a cease-and-desist order.

The Commission made the following findings: Petitioner distributes a variety of merchandise (including cameras, watches, jewelry, safety razors and household and toilet articles) through the use of lottery devices known as pull cards and push cards. Petitioner mails such cards to members of the public whom he regards as prospective distributors of the merchandise. The cards contain a number of pull or push tabs, each of which conceals its cost. A person who pulls or pushes a tab pays the disclosed amount, which varies among tabs. On the push cards, three of the tabs entitle the holders to designated articles of merchandise; the holders of the other tabs receive nothing. On the pull cards, each tab holder receives a small article, and one holder also receives a major article. The identity of the tabs which receive the particular articles is not disclosed until all the pulls or pushes

have been used. After the card has been completely pulled or pushed, the person circulating it remits the proceeds to petitioner, who in turn forwards the designated merchandise, together with an article for the person circulating the card.

The Commission's cease-and-desist order was issued on February 16, 1956, and was served on petitioner on February 24, 1956. On April 23, 1956, petitioner filed a petition to review that order in the court of appeals. *Carl Drath t/a Broadway Gift Company* v. *Federal Trade Commission,* C. A. D. C., No. 13,303. The Commission filed the transcript of the administrative record with the court on May 31, 1956.[1]

On July 5, 1956, the Commission filed in the court of appeals a motion for an injunction *pendente lite.* Attached thereto were a number of affidavits showing that, after the Commission's cease-and-desist order was served upon him, petitioner (trading under the name of the Hub Sales Company, Chicago, Illinois) had continued the illegal practices. These affidavits showed that in the three and one-half months following service of the order, petitioner had mailed out more than eight million pieces of non-metered mail containing push cards and pull cards;[2] that during that period the Chicago branch office of the Commission had received numerous letters of complaint from persons who stated that they had received such mail-

[1] Briefs have been filed, and the case is expected to be argued in the fall.

[2] This number was computed by dividing petitioner's total postage charges for non-metered mail from February 24, 1956 to June 6, 1956 ($126,468.62) by the listed 1½¢ piece rate. The result is 8,431,241 mailings.

ings; and that many of the complaints stated that the mailings were addressed to young children between five and nine years old. Among the complainants were the Chief of Police of Berkeley, California; a Presbyterian minister; and a number of parents who complained of the adverse effect that such material would have on their children.

After hearing, the court of appeals on August 1, 1956, granted the Commission's motion and entered an order enjoining petitioner, pending hearing and disposition of the petition for review, or until further order of the court, from:

> 1. Supplying to or placing in the hands of others pull cards, push cards or any other devices which are designed or intended to be used in the sale or distribution or [of] respondent's merchandise to the public by means of a game of chance, gift enterprise or lottery scheme;
>
> 2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme.[3]

On August 30, 1956, Mr. Justice Black denied a stay of that order.

ARGUMENT

Petitioner seeks review of an interlocutory order of the court of appeals which enjoins him, during the pendency of proceedings before that court to review a cease-and-desist order of the Federal Trade Commission, from continuing the practices which the Commission prohibited. He contends (1) that the

[3] The prohibitory provisions are the same as those in the Commission's order.

court lacks the power to enter such an order (Pet. 7–12), and (2) that the order entered is defective for various other reasons (Pet. 12–20). Neither contention is valid.

1. Contrary to petitioner's contention (Pet. 7–8), the statutory provision under which the court of appeals acted is not ambiguous, but specifically authorizes an injunction *pendente lite* against continuation of illegal practices which the Commission has prohibited. Section 5 (c) of the Act provides that

> Upon such filing of the petition [to review] and transcript the court * * * shall have power * * * to issue such writs as are ancilliary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite.

Such a broad grant of authority, we submit, fully authorizes an interim injunction against continuation of unfair practices covered by a cease-and-desist order whenever necessary to prevent public injury.

The legislative history of this provision shows that Congress intended to authorize the courts of appeals to prohibit such unfair practices during the period of review proceedings. This provision was added to Section 5 in 1938 by the Wheeler-Lea Act (52 Stat. 111). The report of the Senate Committee on that Act (S. Rep. No. 221, 75th Cong., 1st sess., pp. 6–7) incorporates the following statement by the Chairman of the Commission on a similar provision which a predecessor bill had contained:

> Experience has shown that cases may and do arise where the business practice in question

> is of such a nature that its continuation during the pendency of the proceedings in the circuit court of appeals will work irreparable injury to the public or competitors. * * * since this is a public proceeding, it appears wise to give the circuit court of appeals express power to restrain the continuance of the unfair method pending final decision, whenever, in its opinion, the public interest requires it.

During the floor debate on the bill, Senator Wheeler, its coauthor, gave the following explanation of the provision:

> One other thing that causes delay is that sometimes a company, after years of fighting the Federal Trade Commission, then goes into the Federal courts and further ties up the case. We have provided in this bill that the Federal court may require obedience to the order while appeal is pending, and thus prevent the delay the Senator [Senator Copeland] has rightly condemned, protecting the public through protracted legal proceedings [80 Cong. Rec. 6594].

The fact that this is the first time that a court has acted under this provision does not show, as petitioner argues (Pet. 7–8), that the Commission has doubt as to the court's power to enter such an order. On the contrary, it emphasizes that the Commission has scrupulously refrained from seeking such relief except where deemed necessary to avoid serious injury to the public. That a power need be exercised only in a rare case does not negate its existence. Plainly, the court below was correct in concluding that the public interest required that petitioner not be permitted to continue the widespread distribution of

merchandise through use of gambling devices (many of which were being sent to young children) upon which he embarked after receipt of the Commission's cease-and-desist order.[4]

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[4] As this Court has pointed out, in holding that it was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act to employ a merchandising scheme for the sale of penny candy to children under which the price paid depended upon chance, merchandising schemes "whereby the amount of the return they [purchasers] receive from the expenditure of money is made to depend upon chance" have "met with condemnation throughout the community" and have "long [been] deemed contrary to public policy." *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 313. Commission orders prohibiting the interstate distribution of pull and push cards used for the distribution of merchandise have been upheld by courts of appeals in every circuit in which their validity has been litigated. See *Seymour Sales Co.* v. *Federal Trade Commission*, 216 F. 2d 633, 635–636 (C. A. D. C.), and cases there cited, certiorari denied, 348 U. S. 928; *Halseth* v. *Federal Trade Commission*, C. A. 7, No. 11022, September 15, 1954, unreported, certiorari denied, 348 U. S. 928.

Petitioner urges (Pet. 18) that *United States* v. *Halseth*, 342 U. S. 277, controls. That case held that the initial distribution of push-card devices did not violate the criminal statute (18 U. S. C. 1302) prohibiting the mailing of matter "concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance," on the ground that the statute applied only to an "existing, going lottery or gambling scheme," and not to one that was just getting under way. But petitioner's guilt or innocence under the criminal statute is immaterial in determining whether the scheme violates Section 5 of the Federal Trade Commission Act. For, as this Court stated in the *Keppel* case, *supra*, the sale of merchandise through gambling devices is "unfair" within the meaning of the statute, irrespective of whether the conduct comes within "criminal statutes imposing penalties on gambling, lotteries and the like." A similar contention was made to this Court unsuccessfully in the *Seymour Sales* and *Halseth* cases, *supra* (Nos. 484 and 485, respectively, Oct. Term, 1954), and in *U. S. Printing & Novelty Co.* v. *Federal Trade Commission* (No. 273, Oct. Term, 1953), certiorari denied, 346 U. S. 830.

2. Petitioner's other attacks on the order—that it (*a*) constitutes a prejudgment of the case, (*b*) does not state the reasons for its issuance, and (*c*) is ambiguous—are without merit, and present no question calling for review.

(*a*) It is well settled that "[t]he granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy, is not conclusive on the court on a subsequent hearing, and concludes no rights of the parties." *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 188 F. 2d 294, 298 (C. A. 7), certiorari denied, 342 U. S. 819.[5]

(*b*) Petitioner's contention that the order is required to state expressly the reasons for its issuance is based on Rule 65 (d) of the Federal Rules of Civil Procedure. But that rule applies only to district courts, not to courts of appeals. In any event, in the light of the Commission's application and the statutory provision under which the court below acted, it is plain that the court entered the order because it was "necessary in its judgment to prevent injury to the public * * * pendente lite." Petitioner has not been prejudiced by the absence of a formal recitation in the order to that effect.

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[5] Compare *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F. 2d 744 (C. A. 7), with *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F. 2d 382 (C. A. 7), reversed, 348 U. S. 940. In the first case, the court of appeals held that the district court had erred in denying the Commission a preliminary injunction against certain deceptive acts and practices pending final determination of a Commission Section 5 proceeding involving those practices. In the second case, when the final Commission order enjoining such practices came before the same court on direct review, the court modified the order.

(*c*) Finally, the order adequately informs petitioner what he may and what he may not do. He is free to make lawful sales of merchandise in interstate commerce. On the other hand, he is prohibited from supplying others with pull or push cards or other devices designed or intended to be used in the sale or distribution of merchandise to the public, or from himself selling merchandise in interstate commerce, "by means of a game of chance, gift enterprise or lottery scheme"—a prohibition which also plainly covers consummating or completing a sale so induced. Petitioner can hardly be in doubt as to what the injunction prohibits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1956.

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